78-1865

In The

Supreme Court of the United States

October Term, 1979

No. 78-

DONALD LEE McCABE, D.O.,

Petitioner,

vs.

GALE GREENBERG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Did the United States District Court for the Eastern District of Pennsylvania properly instruct the jury to consider the mentally disabled condition of the plaintiff caused by the defendant in determining when the statute of limitations began to run in a claim governed by Pennsylvania law?

II. Was the interpretation and prediction of state law by the court below a reasonable application of its mandate under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), in the absence of any state law to the contrary?

REASONS FOR DENYING THE WRIT

I.

A United States District Court does not violate the Rules Enabling Act when it submits an interrogatory concerning the statute of limitations to the jury under Federal Rule of Civil Procedure 49.

The window-dressing attached to petitioner's request that this Court examine Pennsylvania state law to determine whether it was correctly applied or predicted by the United States District Court for the Eastern District of Pennsylvania is mere surplusage. Petitioner claims a violation of the Rules Enabling Act, 28 U.S.C. §2072, in the trial court's use of Federal Rule of Civil Procedure 49 to frame an interrogatory to the jury. This ingenious notion is not supported by any citation to authority in the petition for a writ of certiorari. The Rules Enabling Act empowers this Court, and this Court only, to prescribe, *inter alia*, rules of practice and procedure in the district courts. Only this Court possesses the capacity to attempt to violate the Rules Enabling Act, and no allegation is made that this Court has done so in promulgating Rule 49, which was utilized by the lower court in presenting factual issues concerning the statute of limitations to the jury.

What petitioner really complains of is a violation of the directive of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. *Erie* and its progeny, but little else, has been correctly interpreted by petitioner.

II.

The trial court properly permitted the jury to consider the debilitated mental and physical condition of the plaintiff undisputably caused by the defendant in determining whether she had under the circumstances exercised due diligence in discovering whether she was suffering harm as a result of the defendant's conduct.

Plaintiff was under the drug and sexual therapy of an osteopath from 1968 to 1974 and brought this malpractice action within two years of the termination of the defendant's "treatment". Prior to reaching this Court, the defendant's argument was that under the facts of the case, the plaintiff should have discovered her harm and its cause in either 1968 or 1972. That argument has now been abandoned in favor of the one that Pennsylvania law does not require discovery of the cause of harm before the two-year personal injury statute of limitations, Pa. Stat. Ann. tit. 12, §34 (Purdon's 1953), begins to run.

In the trial court and the court of appeals, both parties accepted the standard that the statute began to run when the plaintiff, in the exercise of reasonable diligence, could have discovered that her injury was caused by the defendant, as was subsequently held in *Bayless v. Philadelphia National League Club*, 579 F.2d 37, 40 (3d Cir. 1978). As is obvious from the lower court's opinion in this case, 453 F. Supp. 765 (E.D. Pa. 1978), reproduced in the petition as Appendix A, the trial judge allowed the jury to consider the plaintiff's mental and physical condition because it had been caused by defendant. There was no dispute on this. Defense counsel stipulated that any and all impairment that thus would be considered by the jury was caused by the defendant's conduct (R658a). Moreover, no exception was taken to this part of the charge, and the issue has been waived. Fed. R. Civ. P. 51.

The sole basis upon which the petitioner has at any time asserted that such admitted circumstances should not have been considered by the jury is that under Pennsylvania law, mental incompetency does not toll the running of the statute of limitations. *Walker v. Mummert,* 394 Pa. 146, 146 A.2d 289 (1958). The two situations (mental incompetency and illness caused by the defendant) are far from analogous, especially in the context of the purpose of the Pennsylvania discovery rule which defendant acknowledges. *Ayers v. Morgan,* 397 Pa. 282, 154 A.2d 788 (1959).

In *Walker, supra,* the court recognized the equitable nature of the statute of limitations, calling for a balancing of the interests involved. In *Walker* there was a known accident with immediately serious injuries; the question was whether the victim's insanity (not caused by the accident) should toll the running of the statute of limitations. Here the injury was not known to the patient and was deliberately concealed by the psychiatrist. Defendant argued below that his conduct was so clearly negligent that the plaintiff should have assumed that he was disreputable and sought out independent professional judgment, even though the defendant constantly assured her that his continuing treatment was proper and while she had no ability to seek other help for so long as he kept her psychologically captive to his every whim. In the context of the case, with the facts undisputed and accepted by the jury, the lower court's analogy to the "concealed" sponge in the *Ayers* surgical malpractice case is persuasive. In *Ayers,* the defendant left a sponge in his patient and the patient therefore depended upon others to discover harm and its cause; because the patient was unable to learn of the sponge within the statutory period, the suit was not barred. 154 A.2d at 794.

Nevertheless, petitioner cites *Walker* and *Ayers* and other cases, fortifying them with convoluted logic, to attack in this Court the *Erie* prediction of the court of appeals in *Bayless v. Philadelphia National League Club,* 579 F.2d 37 (3d Cir. 1978),

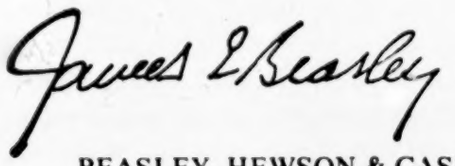
that the statute of limitations does not begin to run until the victim has or should have discovered the cause of her harm. Petitioner relies upon cases such as *Armacost v. Winters,* ____ Pa. Super. ____, 392 A.2d 866 (1978), affirming a jury's finding that that particular plaintiff should have discovered the cause of the harm, and equates harm with negligence by stating that to require discovery ". . . of both the injury and the cause, is to require knowledge of the tort itself . . . ." (Petition at 12). From there petitioner constructs a public policy argument that the Pennsylvania Legislature could not possibly have intended to provide a drugged and sexually abused patient the opportunity to have escaped the clutches of her tormentor *cum* psychiatrist before bringing suit because it would ". . . strike the statute of limitations from the list of available affirmative defenses," (Petition at 14), when the entire purpose behind the Pennsylvania discovery rule is to allow the injured victim a reasonable opportunity to institute suit where the harm and the causal connection cannot be immediately known.

The petitioner has cited no Pennsylvania state court case upholding his interpretation of Pennsylvania law. The court of appeals' decision in *Bayless, supra,* and the opinion of Chief Judge Lord below stand as an accurate reflection of Pennsylvania law.

CONCLUSION

There being no issue presented which petitioner has preserved, no issue improperly decided below and no important state question decided in a way in conflict with applicable state law, respondent respectfully prays that this Honorable Court deny the petition for certiorari.

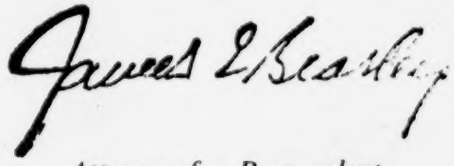
Respectfully submitted,



BEASLEY, HEWSON & CASEY
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of July 1979, three true and correct copies of the Brief in Opposition to the Petition for a Writ of Certiorari were personally served upon Edward B. Joseph, Esq., Kaliner and Joseph, 1600 Two Penn Center Plaza, Philadelphia, Pennsylvania 19102. I further certify that all parties required to be served have been served.



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